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No. 572

IN THE

Supreme Court of the United States

October Term, 1966

PERCY SINFIELD,

Petitioner,

vs.

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, in and for THE COUNTY OF MISSOULA, and THE HONORABLE EMMET GLORE, one of the Judges thereof,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

EDWARD T. DUSSAULT
Western Bank Building
Missoula, Montana
Attorney for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Montana entered in the above cause on June 20, 1966 (Appendix, p. 8), denying petitioner a Writ of Supervisory Control and ordering that his application for such writ be denied and that his proceeding be dismissed.

OPINION BELOW

The order of the Supreme Court of Montana in said cause was not officially reported, but the certified copy of the record before the Supreme Court of Montana, including its order above referred to, has been filed with the Clerk of this Court and a copy of the order is found in (Appendix, p. 8).

JURISDICTION

The order of the Supreme Court of the State of Montana is a final judgment. A petition for rehearing cannot be made.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

The Court below in denying petitioner's application for a Writ of Supervisory Control was in violation of petitioner's rights guaranteed him by the Fifth and Fourteenth Amendments of the Constitution of the United States and is likewise guaranteed him by Article III, Section 3 of the Constitution of the State of Montana.

QUESTIONS PRESENTED

The basic federal questions here involved are:

1. Whether the denial of petitioner's right to file his Complaint in Intervention in the litigation below (Appendix p. 12) deprived petitioner of equal protection of the laws in violation of that portion of the Fourteenth Amendment of the United States Constitution which reads as follows:

> "1. ***nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

2. Whether the denial of the petitioner's right to file his Complaint in Intervention in the litigation below (Appendix p. 12) deprived petitioner, without due process of law, the right to enjoy his property, in violation of the Fifth Amendment of the United States Constitution which is as follows:

"No person ***shall be ***deprived of life, liberty, or property, without due process of law:***"

3. Whether the denial of petitioner's right to file his Complaint in Intervention in the litigation below (Appendix p. 12) deprived petitioner, without due process of law, the right to acquire, possess and protect his property, in violation of Article III, Section 3, of the Constitution of the State of Montana which reads as follows:

"All persons are born equally free, and have certain natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, and of seeking and obtaining their safety and happiness in all lawful ways."

4. Whether that portion of Section 14-502, Revised Codes of Montana, 1947, which reads as follows:

"*Purpose.* Cooperative, nonprofit, membership corporations may be organized under this act for the following purposes:

(a) For the purpose of supplying electric energy and promoting and extending the use thereof in rural areas, in which electrical current and service are not otherwise available, from existing facilities and plants;"

is in violation of the Fifth and Fourteenth Amendments of the United States Constitution as far as this petitioner is concerned and those persons similarly situated to him.

STATEMENT

On or about May 17, 1966, a complaint was filed in the District Court of the Fourth Judicial District of the State of Montana in and for the County of Missoula, as cause No. 29454 entitled "The Montana Power Company,

a Montana Corporation, Plaintiff, vs. Missoula Electric Cooperative, Inc., a corporation, and Eugene F. Pike, as manager, Defendants." Summons was issued thereupon and served upon Defendants (separate record before the Court below).

Plaintiff Power Company sought to enjoin, and did obtain from the District Court, a Temporary Restraining Order, prohibiting the Defendant Cooperative and its manager from serving two premises then under construction, one of which was owned by petitioner.

Electric distribution lines of both the Plaintiff Power Company and Defendant Cooperative were in existence at the time and for several years previously and were about the same proximity to the premises of petitioner. Petitioner had applied for membership in, and for electric service from, the Defendant Cooperative. Both applications had been approved and service extended to petitioner's premises before the above litigation was commenced.

Following the service of Plaintiff's Complaint, Summons and Temporary Restraining Order upon Defendant Cooperative, service to petitioner's premises was discontinued by the Cooperative.

Prior to the hearing in the District Court on the Order to Show Cause for a Permanent Injunction, petitioner filed his Motion for Intervention and his proposed Complaint in Intervention, same was noticed for hearing and the hearing was had thereon before the District Court. Following the hearing the State District Court denied petitioner's Motion for Intervention and the Temporary Restraining Order was continued until the further order of the Court.

Thereafter petitioner filed his Petition in the Supreme Court of Montana for a Writ of Supervisory Control, praying that the Supreme Court direct the District Court to

allow petitioner's Complaint in Intervention to be filed. The complete record of the District Court was before the Supreme Court of Montana and is printed separately as the record before the Court below and has been filed with the Clerk of this Court in support of this Petition.

Several days following oral argument before the Supreme Court, the Court entered its Order denying the petition for a Writ of Supervisory Control (Appendix, p. 8).

REASONS FOR GRANTING THE WRIT

The Montana Supreme Court, in denying petitioner's application for a Writ of Supervisory Control, summarily denied the right of petitioner to be heard in Court. It summarily denied his right to raise the constitutional questions herein involved and heretofore enumerated.

The Montana Supreme Court, in denying petitioner's application for a Writ of Supervisory Control, denied the right of petitioner to raise the question of the constitutionality of the Montana statute prohibiting the Respondent Cooperative from serving the petitioner with electric service.

The question of freedom of choice by a consumer of electric service in Montana has never been before the Montana courts. Public interest demands the freedom of contract. Consumer preference, as it is called in several states where the matter has been decided, has never been before the Montana Supreme Court. The right of the petitioner to have this matter adjudicated in Montana was denied him.

CONCLUSION

The record in this case as it appears in the separate printed material submitted with this Petition shows clearly a violation of petitioner's rights under the Fifth and Fourteenth Amendments of the United States Constitution and Article III, Section 3, of the Montana Constitution. As the matter stands now as respects this petitioner, he will be forced to take electric service from a supplier other than his choice. Further, no applicant for electric service can safely apply for same from a cooperative without having first obtained prior approval from a supplier other than a cooperative.

Respectfully submitted,

EDWARD T. DUSSAULT
Western Bank Building
Missoula, Montana
Attorney for Petitioner

September. 1966.

PROOF OF SERVICE

Service of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Montana and of the record before the State Supreme Court is acknowledged by receipt of printed copies thereof this ..... day of September. 1966.

WILLIAM H. COLDIRON
JOHN C. HAUCK
40 East Broadway
Butte, Montana
GARLINGTON, LOHN & ROBINSON
Western Bank Building
Missoula, Montana
By .....
Attorneys for Plaintiff and Respondent

EDWARD T. DUSSAULT
Western Bank Building
Missoula, Montana
By .....
Attorney for Defendant and Respondent

APPENDIX A.

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 11165

STATE EX REL. PERCY SINFIELD,

Petitioner,

vs.

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, in and for THE COUNTY OF MISSOULA and THE HONORABLE EMMET GLORE, one of the Judges thereof,

Respondents.

CERTIFICATE

UNITED STATES OF AMERICA
STATE OF MONTANA } ss.

I, THOMAS J. KEARNEY, being the duly and regularly elected, qualified and acting Clerk of the Supreme Court of the State of Montana, DO HEREBY CERTIFY:

That the attached are full, true, and correct copies of the original Order of Supreme Court, Motion for Intervention and Complaint in Intervention, as filed and of record in my office as Clerk of said Court, constituting a portion of the proceedings in the above-entitled Court in the above-entitled cause.

Dated this 1st day of September, 1966.

/s/ Thomas J. Kearney
Thomas J. Kearney
Clerk of the Supreme Court of the
(COURT SEAL) State of Montana

APPENDIX B.

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 11165

STATE EX REL. PERCY SINFIELD,
Petitioner,

vs.

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, in and for THE COUNTY OF MISSOULA, and THE HONORABLE EMMET FLORE, one of the Judges thereof,
Respondents.

Filed
June 20, 1966
Thomas J. Kearney
Clerk of
Supreme Court
State of Montana

ORDER

PER CURIAM:

Original proceeding. Petition for writ of supervisory control. The application is denied and the proceeding is dismissed.

DATED this 20th day of June, 1966

APPENDIX C.

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA,
IN AND FOR THE COUNTY OF MISSOULA.

THE MONTANA POWER COMPANY, a Montana corporation, *Plaintiff,* vs. MISSOULA ELECTRIC CO-OPERATIVE, INC., a corporation, and EUGENE F. PIKE, as manager of MISSOULA ELECTRIC CO-OPERATIVE, INC., a corporation, *Defendants.*	No. 29454 MOTION FOR INTERVENTION Filed May 20, 1966 Alma R. Samsel, Clerk By Della M. Dyrdahl, Deputy

TO THE HONORABLE DISTRICT COURT:

Comes now PERCY SINFIELD, 2500 South Avenue West, Missoula, Montana, and respectfully represents to the Court as follows:

I.

That applicant seeks to intervene in the above-entitled action under Rule 24, (a) (2) Rules of Civil Procedure, "When the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action;".

II.

That applicant is the owner of one of the residences described in Paragraph IV of Plaintiff's Complaint herein.

III.

That applicant did apply for membership in the Defendant and for service from it and that on the 3rd day of May, 1966, said application for membership and for electric service to applicant's premises was approved by the Defendant's Board of Trustees.

IV.

That pursuant to said application for service, the Defendant did install an extension from its existing distribution line in the immediate vicinity of applicant's proposed residence now under construction and electric service was made available to applicant by the Defendant on May 17, 1966. That applicant and his building contractor have been denied the electrical service supplied by the Defendant through such installation since the issuance of the temporary restraining order served on Defendants on May 18, 1966.

V.

That applicant has an immediate and direct interest in the outcome of this litigation. That should the Plaintiff obtain a preliminary injunction and a permanent injunction and judgment in its favor, this applicant will be bound by said judgment and thereby denied his freedom of choice in obtaining electric service.

WHEREFORE, applicant respectfully moves this Honorable Court for an order allowing him to intervene in this action.

/s/ Edward T. Dussault
Attorney for Applicant

STATE OF MONTANA }
County of Missoula } ss.

PERCY SINFIELD, being first duly sworn upon his oath, deposes and says: That he has read the foregoing Motion for Intervention; that he knows the contents thereof, and that the matters, facts and things therein stated are true of his own knowledge.

/s/ Percy Sinfield

Subscribed and sworn to before me this 20th day of May, 1966.

/s/ Edward T. Dussault
Notary Public for the State of Montana
Residing at Missoula, Montana
(SEAL) My Commission expires June 25, 1967

Service of the foregoing Motion for Intervention is acknowledged by receipt of a copy thereof this 20th day of May, 1966.

GARLINGTON, LOHN & ROBINSON
By /s/ J. C. Garlington
Of Counsel for Plaintiff

EDWARD T. DUSSAULT
By /s/ Edward T. Dussault
Attorney for Defendants

APPENDIX D.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MISSOULA.

THE MONTANA POWER COMPANY, a Montana corporation, *Plaintiff*,

vs.

MISSOULA ELECTRIC CO-OPERATIVE, INC., a corporation, and EUGENE F. PIKE, as manager of MISSOULA ELECTRIC CO-OPERATIVE, INC., a corporation, *Defendants*.

PERCY SINFIELD, *Plaintiff in Intervention*,

vs.

THE MONTANA POWER COMPANY, a Montana corporation, *Defendant in Intervention*.

No. 29454

COMPLAINT IN INTERVENTION

Comes now PERCY SINFIELD, intervenor, and for cause of action against the Montana Power Company, a Montana corporation, complains and alleges as follows:

I.

That intervenor is presently a citizen of Montana and a resident of the County of Missoula, State of Montana, and is now engaged in the construction of a residence near the town of Florence, Ravalli County, Montana.

II.

That in the construction of said residence, electric service is necessary for the convenience of the building contractor employed by intervenor.

III.

That in the immediate vicinity of said residential site, there are electric distribution lines of both The Montana Power Company and Missoula Electric Cooperative, Inc. That intervenor desired electric service from Missoula Electric Cooperative, Inc., and therefore applied for membership in said Cooperative and likewise applied for electric service from it. That both said applications were approved by said Cooperative and electric service was made available by it to intervenor on May 17, 1966.

IV.

That on May 18, 1966, by action brought by the Defendant in Intervention, the Defendant Missoula Electric Cooperative was temporarily restrained from further supplying electric service to intervenor until further order of this Court and as a result thereof, intervenor and his building contractor are now without electric service at intervenor's building site aforementioned.

V.

That The Montana Power Company seeks, by its action filed herein, to force this intervenor to secure electric service from it, thereby depriving this intervenor of his freedom of choice to secure electric service from whom he chooses.

VI.

That the action of The Montana Power Company is in violation of intervenor's constitutional rights guaranteed him by the 5th and 14th amendments of the United States Constitution and of his constitutional rights guaranteed him by Article III, Section 3, of the Constitution of the State of Montana.

VII.

That by its action, The Montana Power Company seeks to deprive this intervenor of his right to full enjoyment of his property. That intervenor will suffer irreparable damage now and in the future if he is denied the right to secure electric service from the supplier of his choice.

WHEREFORE, intervenor prays judgment against the Defendant Montana Power Company as follows:

1. That the temporary restraining order now in effect be forthwith dissolved.

2. That the Complaint be dismissed with prejudice.

3. That the Defendant Montana Power Company be restrained from harassing this intervenor.

4. That intervenor be granted the right to secure electric service from the supplier of his choice.

5. For his costs of suit herein expended.

6. For such other and further relief as to the Court may seem meet and equitable in the premises.

/s/ Edward T. Dussault
Attorney for Plaintiff in Intervention

STATE OF MONTANA } ss.
County of Missoula }

PERCY SINFIELD, being first duly sworn upon his oath, deposes and says: That he is the Plaintiff in intervention in the above-styled cause; that he has read the foregoing Complaint, knows the contents thereof, and that the matters, facts and things therein stated are true of his own knowledge.

/s/ Percy Sinfield

Subscribed and sworn to before me this 20th day of May, 1966.

/s/ Edward T. Dussault
Notary Public for the State of Montana
Residing at Missoula, Montana.
(SEAL) My Commission expires June 25, 1967

Service of the foregoing Complaint in Intervention is acknowledged by receipt of a copy thereof this 20th day of May, 1966.

GARLINGTON, LOHN & ROBINSON

By .....
Of Counsel for Plaintiff and Defendant in Intervention

EDWARD T. DUSSAULT

By .....
Attorney for Defendants.